

8 Petitioner, proceeding pro se, filed a petition for a writ of
9 habeas corpus pursuant to 28 U.S.C. § 2254. The Court granted
10 Respondent's motion to dismiss the petition as untimely and denied
11 Petitioner's request for a certificate of appealability (COA). The
12 Ninth Circuit also denied Petitioner's request for a COA, and the
13 United States Supreme Court denied Petitioner's motion to file a
14 petition for a writ of certiorari out of time.

15 Now pending before the Court is Petitioner's motion, under
16 Rule 60(b) of the Federal Rules of Civil Procedure, to vacate the
17 judgment of dismissal.

DISCUSSION

19 A. Standard of Review

20 Where the district court's ruling has resulted in a final
21 judgment or order, a motion for reconsideration may be based on
22 Rule 60(b) of the Federal Rules of Civil Procedure. See Am.
23 Ironworks & Erectors v. N. Am. Constr. Corp., 248 F.3d 892, 898-99
24 (9th Cir. 2001). Rule 60(b) provides for reconsideration where one
25 or more of the following is shown: (1) mistake, inadvertence,
26 surprise or excusable neglect; (2) newly discovered evidence which
27 by due diligence could not have been discovered before the court's
28 decision; (3) fraud by the adverse party; (4) the judgment is void;

1 (5) the judgment has been satisfied; (6) any other reason
2 justifying relief. Fed. R. Civ. P. 60(b); School Dist. 1J v.
3 ACandS Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

4 Motions for reconsideration should not be frequently made or
5 freely granted; they are not a substitute for appeal or a means of
6 attacking some perceived error of the court. See Twentieth
7 Century-Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1341 (9th Cir.
8 1981). "[T]he major grounds that justify reconsideration involve
9 an intervening change of controlling law, the availability of new
10 evidence, or the need to correct a clear error or prevent manifest
11 injustice.'" Pyramid Lake Paiute Tribe of Indians v. Hodel, 882
12 F.2d 364, 369 n.5 (9th Cir. 1989) (citation omitted).

13 B. Background

14 In 1996, Petitioner was found guilty of theft and burglary;
15 additionally, the trial court found true the allegation that
16 Petitioner suffered a prior burglary conviction in 1988. In 1997,
17 the convictions and sentence were affirmed on appeal.

18 As relevant to the present motion, in March 2005 Petitioner
19 discovered an opinion issued by the California Supreme Court,
20 People v. Davis, 18 Cal. 4th 712 (1998), which led him to conclude
21 that he had not been provided with the effective assistance of
22 counsel. Specifically, Davis discusses the definition of "entry,"
23 which is a necessary element of burglary and, in so doing, relies
24 on the case of People v. Gauze, 15 Cal. 3d 709 (1975), which holds
25 that a person cannot burglarize his or her own home. See Davis, 18
26 Cal. 4th at 721. Upon his discovery of the Davis case, Petitioner
27 filed state habeas petitions claiming that his trial counsel knew
28 that Petitioner's 1988 burglary conviction concerned the burglary

1 of Petitioner's own home and, consequently, counsel should have
2 moved to strike the prior conviction and appellate counsel should
3 have raised on appeal the failure to do so. Petitioner's state
4 habeas petitions were denied.

5 After he filed the present petition in 2007, the Court, as
6 noted, granted Respondent's motion to dismiss the petition as
7 untimely. In particular, the Court rejected Petitioner's argument,
8 among others, that he was entitled to equitable tolling of the
9 limitations period. Specifically, the Court found as follows:

10 Petitioner argues that he is entitled to equitable
11 tolling under "the doctrine of fraudulent concealment."
(Mem. in Supp. of Pet. for Writ of Habeas Corpus at 21.)
12 Petitioner summarizes his claim as follows:

13 Due to his lack of adequate knowledge of the
14 law and sole reliance on appointed counsel
representing him in the trial and appellate
courts, Petitioner had no objectively
15 reasonable cause to believe or even remotely
suspect that any grounds existed to justify the
relief sought by this current petition until
16 March of 2005, when Petitioner came upon the
People v. Davis case.

17 (Pet. at 12-13.) According to Petitioner, it was not
until he discovered Davis that he could have known that
his counsel had failed to inform him of it. Based upon
18 his total reliance on counsel, he alleges that counsel's
failure to inform him of Davis amounts to "fraudulent
concealment" entitling him to equitable tolling.

19 There is no "doctrine of fraudulent concealment" in
the equitable tolling context. Petitioner has not
20 alleged any affirmative conduct on the part of his trial
or appellate counsel that amounts to concealment.
Instead, Petitioner is effectively alleging that he is
21 entitled to equitable tolling because he was ignorant of
the law and his former counsel failed to notify him of a
new case.

22 Petitioner's argument fails. The law is clear that
ignorance of the law and lack of legal experience
23 typically do not excuse untimely filing, even for a pro
se incarcerated prisoner. Raspberry v. Garcia, 448 F.3d
1150, 1153 (9th Cir. 2006).

24
25 Aug. 28, 2008 Order at 10:22-11:20.

1 C. Motion for Reconsideration

2 In the present motion, Petitioner argues the judgment of
3 dismissal should be vacated based on the United States Supreme
4 Court's decision in Holland v. Arizona, 130 S. Ct. 2549 (2010),
5 which held that (1) the federal habeas statute of limitations, set
6 forth at 28 U.S.C. § 2244(d), is subject to equitable tolling;
7 (2) federal courts must consider the applicability of equitable
8 tolling on a case-by-case basis and not be mechanical in their
9 application of the doctrine; and (3) depending on the particular
10 facts, an attorney's unprofessional conduct can be so egregious as
11 to create an extraordinary circumstance warranting equitable
12 tolling. See id. at 2562-64. Specifically, Petitioner argues
13 that, in view of Holland, this Court erred by failing to find that
14 his trial and appellate attorneys' unprofessional conduct entitles
15 him to equitable tolling.

16 1. Fraudulent Concealment

17 As an initial matter, the Court will not reconsider
18 Petitioner's argument that he is entitled to equitable tolling of
19 the statute of limitations because of his attorneys' alleged
20 "fraudulent concealment" of the legal authority discussed in Davis
21 concerning the burglary of one's own home. As noted in the Order
22 granting the motion to dismiss, no doctrine of fraudulent
23 concealment has been recognized in the equitable tolling context.
24 Additionally, Petitioner has not alleged facts which show that
25 either his trial or appellate counsel affirmatively acted
26 fraudulently to conceal from him information about the pertinent
27 legal authority.

28

1 2. Equitable Tolling

2 The Supreme Court has determined that § 2244(d) is subject to
3 equitable tolling in appropriate cases. Holland, 130 S. Ct. at
4 2560. "[A] 'petitioner' is 'entitled to equitable tolling' only if
5 he shows '(1) that he has been pursuing his rights diligently, and
6 (2) that some extraordinary circumstance stood in his way' and
7 prevented timely filing." Id. at 2562. Serious attorney
8 misconduct may constitute extraordinary circumstances. Id. at
9 2564-65.

10 Equitable tolling will be available only if the petitioner can
11 show that "the extraordinary circumstances were the cause of his
12 untimeliness and that the extraordinary circumstances made it
13 impossible to file a petition on time." Ramirez v. Yates, 571 F.3d
14 993, 997 (9th Cir. 2009) (internal quotation and citation omitted).
15 Thus, where a petitioner fails to show a causal connection between
16 the grounds upon which he asserts a right to equitable tolling and
17 his inability timely to file a federal habeas application, the
18 equitable tolling claim will be denied. Gaston v. Palmer, 417 F.3d
19 1030, 1034-35 (9th Cir. 2005).

20 Here, Petitioner maintains that the failure of his trial and
21 appellate counsel to challenge his prior conviction and inform him
22 about the Gauze and Davis holdings amounts to serious misconduct
23 which constitutes extraordinary circumstances. The record,
24 however, is insufficiently developed for the Court to assess
25 whether counsel's failure amounted to serious misconduct, was
26 negligent, or was based on legitimate strategic decisions.

27 Further, even if the Court assumes that serious misconduct
28 occurred, to be entitled to equitable tolling Petitioner also must

1 show that such misconduct was the cause of the untimely filing of
2 the instant petition. This he has not done. The attorney
3 misconduct complained of occurred in 1996 and 1997, during the
4 pendency of Petitioner's state criminal trial and appellate
5 proceedings. Petitioner was aware at that time that his prior 1988
6 conviction concerned the burglary of his own residence, but not of
7 the legal significance of that fact. Petitioner did not discover
8 the Davis case until 2005, at which time he became aware of the
9 legal basis for his ineffective assistance of counsel claims. The
10 Davis case was published in 1998, approximately one year after the
11 conclusion of Petitioner's direct appeal in 1997. Gauze, which is
12 discussed in Davis and directly supports Petitioner's argument
13 concerning the burglary of one's own home, was published in 1975.

14 Petitioner has presented no evidence that shows his trial or
15 appellate counsel's alleged misconduct caused him to be unable, for
16 approximately eight years, to discover the proposition addressed in
17 Gauze and Davis, exhaust his ineffective assistance of counsel
18 claims in state court and bring his claims to federal court. Nor
19 has he shown that he acted diligently to pursue his legal rights
20 during those eight years.

21 Accordingly, Petitioner's motion to vacate the judgment of
22 dismissal is DENIED.

23 This Order terminates Docket no. 32.

24 IT IS SO ORDERED.

25 Dated: 3/8/2012



26 CLAUDIA WILKEN
27 UNITED STATES DISTRICT JUDGE
28